

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA V. GULLION and DEPARTMENT OF THE NAVY,
NAVY FINANCE CENTER, Great Lakes, IL

*Docket No. 03-2052; Submitted on the Record;
Issued January 7, 2004*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation.

On December 8, 1986 appellant, then a 56-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she was injured when she slipped on ice and fell on her left hip and hand. In a December 8, 1986 report, Dr. Gus Kious, a family practitioner and appellant's treating physician, diagnosed a fractured coccyx as a result of the work-related fall. Appellant returned to her regular duties on December 9, 1986. On March 4, 1987 the Office accepted appellant's claim for a fractured coccyx.

In a March 1, 1988 report, Dr. J.W. Sampliner, a radiologist, compared x-rays from April 1986 and December 1986 which showed a very mild anterior wedging of the L3 vertebral body first apparent on December 8, 1986 and which continued to be present. In a March 8, 1988 letter, Dr. Kious noted a history of pain in appellant's coccyx region and her left sacroiliac (SI) joint. The pain from her coccyx fracture resolved within six months but her left SI joint pain had not resolved. He noted that, on physical examination, appellant demonstrated pain in the left SI joint area with lateral flexion of the lumbar spine limited to 90 degrees and full extension with no neurological defects. He concluded that on December 4, 1986 appellant sustained left sacroilitis that was unresolved. In a June 23, 1988 decision, the Office accepted a compression fracture at L3 and strained left SI joint.

On March 17, 1991 appellant claimed a recurrence of disability, stating that she had persistent pain in her lower back and left hip since the December 4, 1986 fall. In an accompanying letter, appellant noted that she had continuing pain in her left hip and iliac area as well as her low back and buttock with shooting and burning pain in the thighs, more severe on the left side. Appellant filed for disability retirement on November 30, 1990. In a March 19, 1996 letter, the Office noted that appellant's claim was accepted for a fractured coccyx, compression fracture at L3 and strained left sacroiliac joint. It combined this claim with an

accepted 1976 claim for low back and neck strain and noted that appellant did not lose any work time due to the 1976 claim.

On August 16, 1996 appellant was referred for a second opinion examination to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon. In an August 19, 1996 report, Dr. Kaffen noted that appellant presented with a persistent, low back pain with radiation to both thighs which was aggravated by bending and lifting. Appellant stated that she had paresthesia in her lower extremities and radicular symptoms that occurred with prolonged standing. On physical examination Dr. Kaffen found a full range of motion of the cervical and thoracic spine without pain. In the lumbosacral area, appellant had a full range of motion with discomfort on full flexion and extension. There was no tenderness to palpation in the coccyx area. He concluded that, based on the history and his physical examination, there were no objective physical findings or residuals of the work-related injuries and that appellant could perform her date-of-injury position without restrictions.

In an October 30, 1996 letter responding to an Office inquiry, Dr. Kaffen indicated that appellant's work restrictions were prophylactic in nature. He noted that a compression fracture occurred due to an axial loading of the vertebral body. In appellant's case, the trabeculi of the cancellous bone within the body collapsed. Depending upon the quality of the bone and the amount of axial force applied, the vertebral body would assume a wedge shape of varying degree. Dr. Kaffen further noted that the compressed vertebrae did not resume its normal shape but healed and, therefore, could resolve without residuals. In an August 22, 1997 response to another Office inquiry, Dr. Kaffen noted that appellant could intermittently need medical attention for her accepted conditions because of her pain symptoms.

In a report dated September 17, 1996, Dr. Kious stated that he did not see any significant improvement in appellant's condition since 1991. He opined that appellant was permanently disabled due to her accepted injuries.

The Office found a conflict of medical opinion between Dr. Kious, for appellant, and Dr. Kaffen, the impartial medical specialist.

In a September 23, 1997 letter, the Office referred appellant, together with a statement of accepted facts to Dr. Timothy Nice, a Board-certified orthopedic surgeon, for an impartial examination. In an October 2, 1997 report, Dr. Nice noted that x-rays showed significant disc space narrowing at L4 compatible with severe discogenic disease. He indicated that appellant needed a magnetic resonance imaging (MRI) scan to determine the true nature of her back symptoms and, if possible, would like to look at the 1986 x-rays to determine if it was employment related. He concluded that, at this point and time, he would have to assume that the disc space narrowing was related to the fall.

In a May 26, 1998 letter, the Office sent Dr. Nice the x-rays taken in April and December 1986 for a follow-up opinion. Dr. Nice did not respond to the Office's inquiries.

In a January 9, 2002 letter, the Office referred appellant to Dr. Kenneth Chapman, a Board-certified orthopedic surgeon, for a second impartial medical examination. In a January 31, 2002 report, Dr. Chapman, after evaluating appellant's medical history and

conducting a physical examination, opined with medical certainty that the changes in appellant's spine were not related to her accepted injuries in 1976 or 1986. He noted that there was no documented history that a compression fracture of the lumbar spine, particularly when minimal enough that it was not apparent on x-rays, would lead to any permanent residuals. Dr. Chapman found that appellant had residuals of degenerative arthritis of the lumbar spine, but upon evaluation and consideration of the time period before she became significantly symptomatic, that he concluded that the changes in her lumbar spine were not related to the accepted injuries. Dr. Chapman noted that, if appellant had not sustained the accepted injuries, she still would have experienced progressive deterioration of her spine and not be able to work secondary to her degenerative arthritis. Dr. Chapman noted that he saw many patients with lumbar stenosis and degenerative arthritis of the lumbar spine with no history of a previous injury. He agreed with Dr. Kaffen that, although appellant had significant back problems, there was no objective evidence of residuals of the accepted injuries.

In a May 15, 2002 letter, the Office proposed terminating appellant's compensation for wage-loss and medical benefits based on the opinion of Dr. Chapman, the impartial medical specialist. In a June 10, 2002 letter, Dr. Kious noted that appellant had no back problems, work absences or tardiness prior to the accepted injury and, following that event, she had persistent symptoms in both legs and her back which were disabling and resulted in suboptimal work performance and impairment of her life activities. He stated that it was "common sense" that appellant's symptoms and disability dated from her 1986 injury. Dr. Kious added that lumbar stenosis and degenerative arthritis were progressive diseases and could result from trauma. He concluded that appellant's condition was in the "grey zone" of causality but was temporally connected to her original injury.

In a June 19, 2002 decision, the Office terminated appellant's compensation benefits finding that the weight of the medical evidence rested with Dr. Chapman, the impartial specialist.

On June 27, 2002 appellant requested an oral hearing. At the May 20, 2003 hearing, appellant argued that the Office was obligated to determine whether her spinal stenosis was causally related to the accepted conditions. In a July 23, 2003 decision, the hearing representative affirmed the June 19, 2002 decision finding that the weight of the medical evidence rested with Dr. Chapman.

The Board finds the Office met its burden of proof to terminate appellant's compensation.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of

¹ 5 U.S.C. §§ 8101-8193.

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The Office properly determined that there was a conflict in the medical opinion between Dr. Kious, appellant's attending Board-certified family practitioner, and Dr. Kaffen, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding whether appellant continued to have residuals of her 1976 and 1986 employment injuries. Dr. Kious found that appellant was permanently disabled due to her employment injuries, while Dr. Kaffen found no ongoing residuals of the employment injuries. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, for an impartial medical examination and an opinion on the matter.⁵ The Office initially chose Dr. Nice, but he indicated, in his October 2, 1997 report, that he wished to review the 1986 x-rays. The Office provided the x-rays and requested a supplemental report, but Dr. Nice did not respond. Therefore, Dr. Chapman was properly selected as the impartial medical specialist.

The Board has carefully reviewed the opinion of Dr. Chapman and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the case. Dr. Chapman's January 31, 2002 opinion is based on a proper factual and medical history, he reviewed an accurate and up-to-date statement of accepted facts reported his findings on physical examination. Dr. Chapman provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁶ Dr. Chapman noted that there was no documented history that a compression fracture of the lumbar spine, particularly when minimal enough that it is not apparent on x-rays, would lead to any permanent residuals. He noted that appellant had residuals due to degenerative arthritis of the lumbar spine. Dr. Chapman concluded, however, that the degenerative disease was a progressive condition which was not caused by the accepted employment injuries. Dr. Chapman stated that if appellant had not sustained the accepted injuries, she still would experience the progressive deterioration of her spine and not be able to work secondary to her degenerative arthritis. He concluded that her residuals were due to the degenerative process and not her accepted employment injuries.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷

⁴ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

⁶ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

⁷ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Board finds that the weight of the medical evidence is represented by the thorough, well rationalized opinion of Dr. Chapman, the impartial medical specialist selected to resolve the conflict in the medical opinion. The January 31, 2002 report of Dr. Chapman establishes that appellant had no continuing condition causally related to her December 5, 1986 employment injury.

Following the report of Dr. Chapman, appellant submitted the June 10, 2002 report of Dr. Kious who addressed the temporary connection of appellant's condition to her employment injuries. The Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient to establish causal relationship.⁸ Moreover, as Dr. Kious was on one side of the conflict that Dr. Chapman was requested to resolve, the additional report is not sufficient to overcome the weight accorded to the impartial medical specialist.⁹ Appellant contended that the Office was obligated to determine whether her spinal stenosis was causally related to the accepted injuries. The Board's notes, however, that as this condition was not accepted as employment related, appellant retains the burden of proof to establish such causal relationship.¹⁰

The decision of the Office of Workers Compensation Programs dated July 23, 2003 is affirmed.

Dated, Washington, DC
January 7, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ See *Thomas D. Petrylak*, 39 ECAB 276 (1987).

⁹ See *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁰ See *Brian H. Derrick*, 51 ECAB 417 (2000).